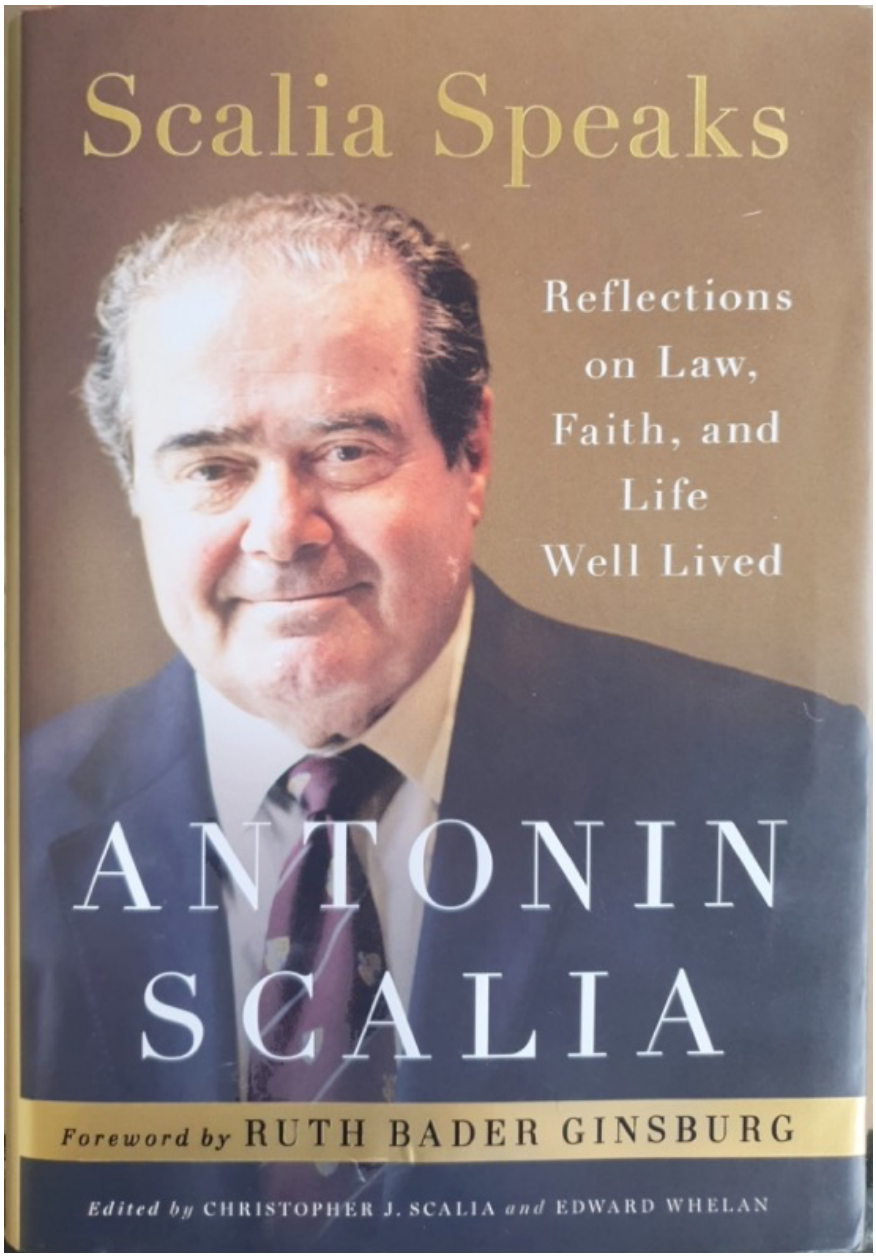

ON LAW – THE IDEA OF THE CONSTITUTION
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The Idea of the Constitution

How and why has our Constitution endured over the centuries? Justice Scalia explored this topic during and after the Constitution's bicentennial in 1987, including in this Alexander Meiklejohn Lecture at Brown University in April 1991. For all that we celebrate the Bill of Rights, it is, he argued, the "humdrum" structural and mechanistic provisions of the Constitution that deserve the lion's share of credit for its durability.

I want to share a few thoughts with you this evening concerning the Constitution of the United States.

If you have ever been to a formal dinner—a dinner of this sort—in England, you will recall that after dessert and coffee, and before it is permitted to light a cigarette, a toast is customarily presented: "Ladies and gentlemen, the Queen." And if you have ever been to a diplomatic function involving participants from England and the United States, you will recall that it is the custom to reply to that toast with a toast "To the president of the United States."

Every time I hear that progression it strikes me that the comparison does not really work. The president is, to be sure, both our chief executive and our head of state, our prime minister and queen combined. But if one wishes to evoke the deep and enduring symbol of our nationhood and our unity as a people, it seems to me the toast ought to be "Ladies and gentlemen, the Constitution of the United States." For that is the equivalent of the royal armies that brought forth one nation out of a diversity of states; and not only the token but indeed the substance of what continues to bind us together as a people.

The constitutional scholar and political philosopher Walter Berns recently published a book entitled *Taking the Constitution Seriously*, in which he makes the striking observation—striking to me, at least, because it is obviously true but I had never thought of it—that the word *un-American* has no equivalent in any other nation. It would mean nothing in French or German political debate to call a particular idea (let us say the abolition of the rights of free speech) "un-French" or "un-German." Unlike any other nation in the world, we consider ourselves bound together, not by genealogy or residence but by belief in certain principles; and the most important of those principles are set forth in the Constitution of the United States.

The wondrous durability of the Constitution is attributable to a whole series of irreplicable circumstances—incredibly lucky, if you will, or, as many of the Founders thought, providential. When else has a government been established, not by conquerors dividing up the spoils, or even by political parties parceling out the power, but by a four-month seminar consisting of many of the most erudite *and politically experienced* individuals in the nation? The historian Clinton Rossiter has described the prominence of the fifty-five delegates as follows:

> The Republic had two men of world-wide fame, and both were on the list. [He was referring to Washington and Franklin, of course.] It had perhaps ten who were well-known within the bounds of the old [British] empire, and at least five of that description (Johnson, Livingston, Robert Morris, Dickinson, and Rutledge) were on it, too. Gorham, Gerry, Sherman, Ellsworth, Hamilton, Mifflin, Wilson, Madison, Wythe, Williamson, Charles Pinckney, and the untraveled Mason had won themselves—as best one could in those days of poor communications—continental reputations; Langdon, Read, Randolph, Alexander Martin, Jenifer, and C. C. Pinckney were major figures in their states; and almost every other delegate was someone whose standing was unchallenged in his part of the country.

As for governmental experience: "All but two or three Framers had served as public officials of [a] colony or state." A remarkable forty-two of the fifty-five had served in the Congress of the United States. As for education: "In an age when few," even from the richest families, "went to college," the fifty-five members of the Convention included nine graduates of the College of New Jersey (Princeton), four graduates of Yale, four from William and Mary, three from Harvard, two from King's College (Columbia), two from the College of Philadelphia (University of Pennsylvania), and one each from Oxford and St. Andrews. Several others had studied law at the Inns of Court. A number of those mentioned earlier had done graduate work—and six held professorships or tutorships. (All per Rossiter.)

These extraordinary individuals—much of the cream of the society at the time—did not meet a couple of times to vote on reports prepared by their staff. They met personally five or six hours a day, six days a week—from mid-May to mid-September—almost an entire baseball season! And after, the plenary sessions often filled their evenings with committee work or informal discussion. Imagine getting individuals of that prominence in our national life to make that kind of a time commitment today.

Yale University Press has recently come out with a paperback edition of Farrand's *Records of the Convention*—consisting principally, of course, of the notes that Madison meticulously kept. I urge you, some rainy weekend, to read them. They are full of the spirit of the Age of Reason—the belief, which seems almost naive to many of us cynical moderns, that the application of logic and experience to any problem will produce, if not perfection, at least improvement. They were engaged in the enterprise of applying what Madison called "the new science of government." The records are also full of the spirit of honest, open discussion and persuasion. What must impress the reader is how often views expressed by particular participants at the beginning of the summer are different from the views those same participants express in the fall—their minds having been changed by the intervening discussion. I might interject that that openness to persuasion is as essential to

the continuation of our republic as it was to its formation. So also is the spirit of humility, and of generous acceptance of the majority's judgment, expressed in the famous concluding speech of Benjamin Franklin, when he urged all the delegates, on the last day of the Convention, to come forward and sign the final document. We have that speech in its original form since Franklin, who was eighty-one and in poor health, was unable to stand long enough to deliver it and gave the written text to James Wilson to read, and later to Madison to copy. It went in part as follows:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. . . .
>
> In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe farther that this is likely to be well administered for a course of years. . . . I doubt too whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies. . . . Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors, I sacrifice to the public good—I

> have never whispered a syllable of them abroad—Within these walls they were born, and here they shall die.

Having said a lot about the process of the Grand Convention, let me say just a little about its product. That product did not include the portion of the Constitution that Americans most often invoke, the Bill of Rights. That was added on the proposal of the First Congress, as the first ten amendments—though the understanding that something of the sort would be added was almost a condition of its ratification by many of the states. It is paradoxical that what was an afterthought should have become its most celebrated feature. In the commemorations of the bicentennial that are currently being held, the specific provisions that are normally given the most extensive (if not indeed the exclusive) praise are not the bicamerality of the legislature, or the separate election of the president, or the presidential veto power, or life tenure for judges, or the brief, two-year terms for members of the House, or the six-year terms for members of the Senate, or any of the other expertly crafted provisions that pertain to the structure, the "constitution," of our government; but rather, freedom of speech, freedom of religion, and freedom of the press—provisions of the subsequently adopted Bill of Rights. So completely does that portion of the document attract the affection and the devotion of the people.

If the virtue of a constitution is to be assessed primarily on the basis of this popular feature, one must admit that the Constitution of the United States fares rather badly. Take, for example, protections against governmental intrusion upon privacy. The United States Bill of Rights contains no more explicit protection than the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Compare that to the much more explicit and extensive guarantees of a prominent modern constitution:

> Citizens are guaranteed inviolability of the person. No one may be arrested except by a court decision or on the warrant of a procurator.
>
> Citizens are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it.
>
> The privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications is protected by law.

Or consider freedom of religion. Our First Amendment says no more than the following:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Compare that with a prominent modern constitution, which says:

> Citizens are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.

Or freedom of speech and assembly, as to which the United States Constitution says only:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Compare that paltry guarantee with the modern constitution I have been describing, which says:

> Citizens are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations.
>
> Citizens have the right to associate in public organizations that promote their political activity and initiative.
>
> Persecution for criticism [of state bodies and public organizations] is prohibited. Persons guilty of such persecution shall be called to account.

You will see the point I have been driving toward when I tell you that the modern constitution I have been describing is that of the Union of Soviet Socialist Republics. I would not trade our old Constitution for that in a million years. And if I had to pick a country other than my own in which I thought my individual rights would be most secure, I would very likely choose England or Australia, both of which are among the significant holdouts in the universal movement toward bills of rights.

The reason, of course, is that a bill of rights has value only if the other part of the constitution—the part that really "constitutes" the organs of government—establishes a structure that is likely to preserve, against the ineradicable human lust for power, the liberties that the bill of rights expresses. If the people value those liberties, the proper constitutional structure will likely result in their preservation even in the absence of a bill of rights; and where that structure does not exist, the mere recitation of the liberties will certainly not preserve them. So while it is entirely appropriate for us Americans to celebrate our wonderful Bill of Rights, we realize (or should realize) that it represents the fruit, and not the roots, of our constitutional tree. The rights it expresses are the *reasons* that the other provisions exist. But it is those other humdrum provisions—the structural, mechanistic portions of the Constitution that pit, in James Madison's words, "ambition against ambition," and make it impossible for any element of government to obtain unchecked power—that convert the Bill of Rights from a paper assurance to a living guarantee. A crowd is much more likely to form behind a banner that reads "Freedom of Speech or

Death" than behind one that says "Bicameralism or Fight"; but the latter in fact goes much more to the root of the matter.

Besides the importance of structure, there is another characteristic of a constitution, or at least of a written constitution, that I think you ought to bear in mind. Like any written document, it says some things (which it means); and it does *not* say other things (which it therefore does not mean). As lavishly as I have praised our Constitution, I do not mean to suggest that it contains, not only what it contains, but *all* that is good and true. Indeed, I do not even mean to suggest that every single thing it *does* contain is necessarily good and true for modern society, or indeed was even necessarily good and true when it was adopted. Nor did the Founders think so—which is why they specifically included a provision for amendment.

The notion has somehow gained currency, however, that if something is intensely bad, it must be prohibited by the Constitution; or if intensely desirable, it must be required by the Constitution. How can one possibly think that of a document that determined the apportionment of representatives among the various states on the basis of population consisting of "the whole Number of free Persons" and "three fifths of all other Persons"—a not-so-subtle reference to slavery, which was then and there *known* to be an evil, recognized as such even by some Convention delegates from the southern states that supported it. The Constitution was not perfect when crafted, in other words—just the best that could be done if the Union was to be achieved. We fought our bloodiest war, and adopted our most important amendment, to get rid of that particular defect.

It is plainly unhistorical, therefore, to regard the Constitution as simply a shorthand embodiment of all that is perfect—to think that whatever element of perfection does not appear there explicitly *must* be contained within more vague guarantees, such as the guarantee of due process, or freedom from unreasonable searches, or equal protection. But who cares if it is unhistorical; we have never been a nation that cared much about history. More important is the fact that the practical consequences of such an attitude

will, in the long run—indeed, in the not so long run—destroy the ability of the Constitution to preserve the guarantees that it *does* contain. If the Constitution does not mean what it objectively *says*, but rather what it *ought to say*; if "due process," for example, does not mean what it originally meant, but rather what it *ought to mean* today; then someone will have to decide the normative question of what it *ought to mean*. And in a democratic society that someone will ultimately be the majority. The individual guarantees of the Constitution will thereby have been placed under the supervision of the very entity it was their purpose to restrain: the majority.

But, you may object, that normative question will *not* be decided by the majority; it will be decided by the Supreme Court. And the Supreme Court is an anti-majoritarian institution if there ever was one. That is true enough, or at least has been. But the Supreme Court has, throughout most of our history, been able to get away with pronouncing decisions against majority sentiment only because our society has accepted it to be the Court's job, not to say what the Constitution *ought to provide*, but what it *did* provide: what its text meant in light of the traditions within which that text was adopted. To be sure, now and then—perhaps even more often than now and then—the justices might shade a point, and distort text or history a bit in order to produce what they considered a more desirable result. But they at least had the decency to lie about it; they purported to be applying the Constitution as it was enacted, and not a constitution that they themselves adjusted to accord with modern times. Only in the past few decades has that changed, so that modern justices, with full support of the academy, feel authorized to revise original meaning in order to accord with "the evolving standards of decency that mark the progress of a maturing society." That is a new ball game, and we are only beginning to see how it will be played.

Initially, perhaps, the justices who adopted the new vision of their role could find the "evolving standards" to be those of an intellectual elite from which judges are drawn. But in the nature of things, that could not last. Once the cat was out of the bag—once the society at large accepted the version of the Court's role that

the Court set for itself: conformance with modern standards—it was inevitable that the majority would assert itself, and the text of the Constitution could no longer defend against it. If the criterion of constitutionality is desirability; if judges (or at least justices) are not to be men and women "learned in the law," skilled in techniques of textual construction familiar to lawyers and faithful to traditions set forth in old and musty cases; if they are instead barometers of "evolving standards of decency" and arbiters of what the modern American Constitution *ought to be*—why, then, the method of selecting this Supreme Court ought to be much different from what it has been in the past. We should look not for learning and lawyerly skills, but for attunement to what the "evolving standards of decency" are, to what the current society's vision of a good constitution happens to be—we should look, in other words, for people who agree with the majority. Thus, under this new regime, we can expect to have confirmation hearings in which exchanges with the senators (representatives of the majority) might be expected to go something like this:

Q: Judge Jones, do you think there is a right to bear arms [or a right to homosexual conduct, or a right to burn the flag—or whatever—fill in your favorite or least favorite right]? Do you think there is such a right in the Constitution?

A: No, Senator, I do not.

Q: You don't? Well, I think it's there; and my constituents think it's there. [Or, if the answer has been that the right does exist, "Well, I don't think it's there, and neither do my constituents."] And we certainly don't want somebody with your views, with your lack of sensitivity [or, if the opposite, "your radical philosophy"] sitting on the Supreme Court.

Never mind that neither the senator nor his constituents have intensively studied the constitutional text, and the tradition that lies behind it. That doesn't matter. That is no longer relevant. We, the majority, want the Constitution that we want, and we want it now.

One of the fallacies of the theory of the evolving Constitution is that it always evolves in the direction of greater personal liberty—so there is no harm done. That is demonstrably false. The swift highway of a Constitution that means what it ought to mean leads in both directions: to more individual freedom, or to less. Take, for example, the reduction, in Supreme Court jurisprudence, of the protections afforded to property rights, a development that has not in all respects been faithful to text and tradition. We (the majority) all agree with that development—it is more in accord with our twentieth-century notions that value property rights less than the Founders did. (When Canada recently adopted a bill of rights, modeled in some respects on ours, its Due Process Clause was worded to protect, not "life, liberty and property," as ours does, but "life, liberty and security.") So hooray, that is all well and good. But let us not pretend that that development has not been a *reduction* of individual liberty. Economic rights are liberties: entitlements of individuals against the majority. When they are eliminated, no matter how desirable that elimination may be, liberty has been reduced.

Finally, let me make one last point about the idea of a constitution, which is perhaps already implicit in what I have already said. No part of the Constitution—neither the structural portions nor the individual guarantees—can be preserved for the people by the Supreme Court alone. A Supreme Court fiercely dedicated to preserving that document cannot exist in the midst of a society that does not understand it. The Court is at best a safety net. The first, and ultimately the most influential, interpreters of the document are the people's elected representatives—who in turn reflect the understanding of the people. The Court can stand against the distortion of original understanding produced by the temporary excess of one brief era—the era of McCarthyism, for example. But in the nature of things the Court cannot stand against a departure from our traditional attitudes—toward the Commerce Clause, toward the reasonableness of searches, toward any constitutional guarantee—that is deep and sustained. The reason is quite simple: the justices of the Court are not dispatched from Mars but are

drawn from the same society that shares those new understandings. So if the understanding persists long enough among the people, it will prevail.

In the last analysis, in other words, the Court cannot save the society from itself—because in the last analysis the Court is no more than the society itself. The compromises of principle, the misperceptions of liberty, that are believed in the homes, learned in the schools, and taught in the universities will ultimately be the body of knowledge and belief that new justices bring with them to the bench. The Constitution will endure, in other words, only to the extent that it endures in your understanding and affection. That is why I used to find it so upsetting, when I taught constitutional law, to learn how many law students in major universities—the best, and the brightest, and presumably those most interested in the law—had never read, cover to cover, such a basic part of our constitutional tradition as the *Federalist Papers*. And it is why I thought it worth the time to speak to you about the idea of the Constitution tonight.